NO. 46512-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

PAUL JASON BURKS,

Appellant.

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# BRIEF OF APPELLANT

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John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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## *ASSIGNMENT OF ERROR*

### *Assignment of Error*

1. The trial court erred when it entered Finding of Fact No. 5 because it is not supported by substantial evidence.

2. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained after illegally detaining the defendant in violation of RCW 46.61.021, Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

### *Issues Pertaining to Assignment of Error*

1. Does a trial court err if it enters a finding of fact unsupported by substantial evidence?

2. In a case in which (1) a police officer stops a driver for speeding, (2) checks for outstanding warrants, checks the status of the person's license, insurance identification card, and the vehicle's registration, and (3) finds out that the driver is a protected party in a no contact order, may that officer then continue to detain the driver in order to take the time necessary to obtain the name and physical description of the respondent in the no contact order action to compare that name and description to the passenger in the vehicle?

## STATEMENT OF THE CASE

By information filed May 28, 2014, the Kitsap County Prosecutor charged the defendant Paul Jason Burks with one count of felony violation of a no contact order, alleging that on May 12, 2014, he knowingly had contact with a protected party by the name of Tanya Bierlein. CP 1-8. These charges arose out of a traffic stop in which a police officer eventually determined that Ms Bierlein was the driver and the defendant was the front seat passenger. *Id.* Following arraignment in this case the defendant moved to suppress all evidence of his identity arguing that the Officer had violated RCW 46.61.021, Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when he illegally detained the defendant and Ms Bierlein in order to follow up on his suspicions that the defendant was the passenger in the vehicle and the restrained party in a no contact order. CP 11, 12-18.

On July 7, 2014, the trial court called the motion for hearing, during which the state called the officer who performed the traffic stop, and the defense called Ms Bierlein and the defendant. RP 7/7/14 4, 24, 29.[1] Following argument the trial court denied the motion. RP 7/7/14 33-41, 41-

[1]The record on appeal includes the verbatim report of the suppression motion held on July 7, 2014, as well as the stipulated facts trial and sentencing held on July 21, 2014. They are referred to herein as "RP [date] [page #].

44. On July 21, 2014, the defendant submitted to conviction pursuant to a trial upon stipulated facts and to sentencing within the standard range. RP 7/21/14 1-18; CP 35, 78-89. Following imposition of sentence the defendant filed timely notice of appeal. CP 33.

On August 12, 2014, the day after the defendant filed his Designation of Clerk's Papers, the prosecutor presented and the court signed the following findings of fact and conclusions of law on the suppression motion:

**FINDINGS OF FACT**

1. That on May 12, 2014, Officer Christopher Faidley was on duty in the City of Bremerton.

2. That he pulled over a silver Honda sedan traveling 41 mph in a 20 mph zone.

3. That the driver was identified as Tanya Bierlein.

4. That when Officer Faidley contacted Ms. Bierlein the first time, he noticed that her passenger was a tall skinny black male who had his hand up to his face as if hiding it.

5. That when Officer Faidley ran Ms. Bierlein's information, he found out that she was the protected party in a no contact order with respondent Paul Burks.

6. That Officer Faidley requested more information on Mr. Burks and was given his height, weight, race and approximate age, a description that matched the passenger in the Honda.

7. That Officer Faidley testified that when he went back to the car the second time, it was to investigate whether or not the crime of protection order violation was being committed.

8. That Officer Faidley does not recall telling Ms. Bierlein when he

went back to her car the second time that he was only going to let her off with a warning, and that it would have been outside of his practice to do so.

9. That both Ms. Bierlein and the Defendant testified that Officer Faidley did tell Ms. Bierlein that he was going to let her off with a warning when he returned to the car a second time.

10. That the Court finds that all parties provided credible testimony as to their perceptions and recollections of what occurred that night.

11. That it is unclear to the Court when Officer Faidley told Ms. Bierlein that he was going to let her off with a warning, but that this fact is not entirely relevant to the Court's analysis.

12. That when Officer Faidley returned to the car a second time, he asked the Defendant for his name.

13. That the Defendant told Officer Faidley that he did not have his identification on him and he told him his name was Alexander Ashiene.

14. That the Defendant volunteered that he is often mistaken for Paul Burks, a name he brought up without any prompting from the officer.

15. That Officer Faidley had Cencom run the name "Alexander Ashiene" and he did not find any record of him in Washington or Oregon.

16. That Officer Faidley then went back to his car and was able to locate a photo of Paul Burks on his computer.

17. That it was clear that Paul Burks was the person sitting in the passenger seat of Ms. Bierlein's car.

## CONCLUSIONS OF LAW

1. That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

2. That Officer Faidley had reasonable suspicion to believe the crime of protection order violation was occurring when he returned to the car

a second time based on the fact that the Defendant appeared to be trying to hide his fact during the first contact and that he matched the description of the respondent in the protection order.

3. That Officer Faidley's reasonable suspicion was further heightened when, unprovoked, the Defendant gave him a different name and told him he was often confused with Paul Burks.

4. That Officer Faidley had the lawful ability to extend his contact with Ms. Bierlein and the Defendant to investigate the crime of protection order violation.

CP 94-97.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDING OF FACT 5 BECAUSE IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to the following highlighted portion of Finding of Fact No. 5 from the Findings and Conclusions on the suppression motion:

> 5. That when Officer Faidley ran Ms. Bierlein's information, he found out that she was the protected party in a no contact order ***with respondent Paul Burks.***

CP 97 (emphasis added).

In fact, a careful review of Officer Faidley's testimony from the suppression motion reveals that the only information he received when he ran Ms Bierlein's name and driver's status was that she was a protected party in a no contact order. He did not claim that the initial information included the defendant's name. This testimony went as follows on this issue:

> Q. Okay. And what happened when you ran her name?
>
> A. The first thing that popped up was an order between her and an individual. She was listed as the protected party in the order. And at that point, I requested dispatch or central command, called CENCOM, to read me back the physicals of the respondent in the order. And when they did, I immediately – was a match to the person in the passenger seat.
>
> Q. What description did you receive?
>
> A. I received height, weight, race. And then I usually get – if I don't get a birthday, I get a birth year, which allows me to determine rough age.
>
> Q. And did you receive all of those physical descriptors here?
>
> A. Yes , ma'am.

RP 7/7/14 9.

As Officer Faidley's testimony reveals, when he ran the driver's name one of the pieces of information that he received was that she was the protected party in a no contact order. He did not receive any information on the respondent to the protection order such as sex or a physical description. Rather, to get that information he had to ask dispatch to contact central

command (CENCOM) to look up that information and send it back to him. Thus, to the extent Finding of Fact No. 5 states that when Officer Faidley ran Ms. Bierlein's information, "he found out that she was the protected party in a no contact order" there is no problem. However, to the extent that the finding claims that the initial report gave any name for a respondent in the no contact order it is not supported by substantial evidence.

**II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED AFTER ILLEGALLY DETAINING THE DEFENDANT IN VIOLATION OF RCW 46.61.021, WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.**

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets it burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry*

*v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) (emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point "the limited violation of individual privacy" is outweighed by the public's "interests in crime prevention and detection . . . ." *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

In addition, the stop of an automobile is a seizure of its occupants and must be measured against the limitations found in Washington Constitution Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). In addition, although the initial stop of a vehicle might be valid, once the initial justification ends, any further detention violates the driver and occupant's right to privacy. *State v. Tijerina*, 61 Wn.App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

For example, in *State v. Tijerina, supra*, a police officer stopped the defendant's vehicle for crossing the fog line. After the stop, the driver

produced a valid license and registration, and the officer decided not to issue a citation. The officer then asked the driver to consent to a search of the vehicle. After obtaining consent, the officer searched the vehicle, found drugs, and arrested the defendant. The Court of Appeals said the following concerning the validity of the search.

> The stop of an automobile is a seizure of its occupants and must therefore be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). In evaluating investigative stops, the court must determine: (1) Was the initial interference with the suspect's freedom of movement justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the interference in the first place? *Terry v. Ohio*, 392 U.S. 1, 19-20, 20 L.Ed.2d 889, 88 S.CT. 1868 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In determining the proper scope of the intrusion, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, at 740.
>
> Here, the initial stop of Mr. Tijerina for crossing over the fog line was justified. The sergeant's request to verify Mr. Tijerina's license and registration was reasonably related to the purpose of the stop. However, once the sergeant made the decision not to issue a citation and returned the driver's license and registration to Mr. Tijerina, any further detention had to be based on articulable facts from which the sergeant could reasonably suspect criminal activity. *State v. Gonzales*, 46 Wn.App. 388, 394, 731 P.2d 1101 (1986).

*State v. Tijerina*, 61 Wn.App. at 628-29.

Similarly, in *State v. Cantrell*, 70 Wn.App. 340, 853 P.2d 479 (1993), a state patrol officer stopped a vehicle for speeding, obtained the driver's license and registration, and issued a speeding citation. After issuing the citation, the officer asked the driver if he had any contraband in the vehicle.

The officer then obtained the driver's consent to search, found drugs in the car, and arrested the passenger. The passenger later moved to suppress, which motion the trial court denied. Following conviction, the defendant appealed, and the court of appeals reversed. The court stated:

> To this point, our case is essentially indistinguishable from *Tijerina*. Here, as in *Tijerina*, the initial traffic stop was justified. Once the purpose of the stop was fulfilled by issuance of a speeding ticket, however, the trooper had no right to detain the car's occupants further absent articulable facts giving rise to a reasonable suspicion of criminal activity. As in *Tijerina*, the trooper failed to provide such facts. His unexplained desire to start searching the car for containers of alcohol is, if anything, even less defensible than the trooper's unreasonable suspicion in *Tijerina* that the presence of motel soap in a vehicle occupied by Hispanics indicated the presence of drugs.

*State v. Cantrell*, 70 Wn.App. at 344.

The principles set out in *Tijerina* and *Cantrell* are also embodied in RCW 46.61.021(2), which states:

> (2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

RCW 46.61.021(2)

In this statute the legislature sets out limits for what a police officer may do upon stopping a person for a traffic infraction such as occurred in this case at bar. As is set out, the officer may "detain that person for a reasonable period of time necessary" to perform four delineated tasks. They are: (1)

identify the person, (2) check for outstanding warrants, (3) check the status of the person's driver's license, insurance identification card and vehicle registration, and (4) complete and issue a notice of traffic infraction. What the officer may not do under the authority of this statute is detain the driver and passengers of the vehicle in order to investigate the possibility that one of the passengers is violating a no contact order. As is set out in *Tijerina* and *Cantrell*, in order to take this action the officer must have a reasonably articulable suspicion based upon objective facts that one of the persons detained was or is engaged in criminal contact. In other words, the officer must have facts sufficient to justify a *Terry* stop if he or she deviates from the conduct allowed in RCW 46.61.021(2). As the following explains, in the case at bar Officer Faidley had no justification for deviating from the limits set in the statute.

In his testimony at the suppression motion Officer Faidley stated the following about his conduct in deviating from the requirements of RCW 46.61.021(2) in order to investigate his curiosity concerning the identity of the respondent in the no contact order for which Ms Bierlein was the protected party.

> Q. Okay. And what happened when you ran her name?
>
> A. The first thing that popped up was an order between her and an individual. She was listed as the protected party in the order. And at that point, I requested dispatch or central command, called

> CENCOM, to read me back the physicals of the respondent in the order. And when they did, I immediately – was a match to the person in the passenger seat.
>
> Q. What description did you receive?
>
> A. I received height, weight, race. And then I usually get – if I don't get a birthday, I get a birth year, which allows me to determine rough age.
>
> Q. And did you receive all of those physical descriptors here?
>
> A. Yes , ma'am.

RP 7/7/14 9.

Under this testimony it does not appear that Officer Faidley deviated from the statute when he obtained the fact that there was an outstanding protection order. As he stated, he received this information as part of the process of running Ms Bierlein's name for warrants. However, as was set out in the preceding argument, the only information he received was the fact that there was a no contact order extant with Ms Bierlein as the protected party. He did not know so much as the sex of the restrained party, let alone age and physical description. Thus, while he had a "suspicion" that it might be the passenger, that "suspicion" does not constitute a "reasonably articulable suspicion based upon objective facts" that the passenger was the restrained party in the order. As a result, by continuing to detain Ms Bierlein and the driver while he followed up on his "suspicions" and obtained more information, he was violating RCW 46.61.021(2) and violating the

defendant's rights under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

An alternate scenario might better illustrate Officer Faidley's error in this case. Suppose Officer Faidley had been familiar with Ms Bierlein's identity and had seen her walking down the street with a man and a woman. Knowing her identity, he decides to run her name for warrants. He does so and receives a reply that (1) there are no outstanding warrants, and (2) she is the protected in a no contact order. Suspecting that one of her companions might be the restrained party he walks up to the trio on the street and orders them to stop and identify themselves. He does so without any individualized suspicion directed towards either of her companions. In such a scenario his actions in detaining the trio would not be justified under *Terry* because he had no individualized suspicion based upon objective facts that either of her companions was the restrained party.

The only difference between this factual scenario and the facts in the case at bar is that in the case at bar Officer Faidley had already detained Ms Bierlein and the defendant when he found out about the existence of a no contact order. However, in this case Officer Faidley's deviation from the allowed conduct under RCW 46.61.021(2) was the legal equivalent to detaining the trio in the preceding factual scenario. Neither actions are justified under *Terry* and both constitute a detention or continued detention

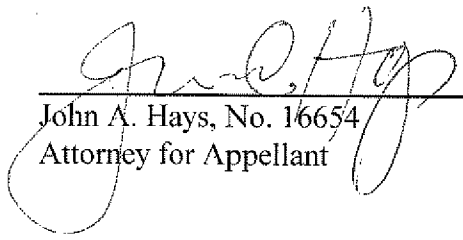
without legal justification. Thus, in the case at bar the trial court erred when it denied the defendant's motion to suppress.

## CONCLUSION

The trial court erred when it denied the defendant's motion to suppress evidence. As a result, this court should vacate the defendant's conviction and remand with instructions to grant the motion.

DATED this 12th day of January, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

## APPENDIX

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

### UNITED STATES CONSTITUTION,
### FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

### RCW 46.61.021
### Duty to Obey Law Enforcement Officer – Authority of Officer

(1) Any person requested or signaled to stop by a law enforcement officer for a traffic infraction has a duty to stop.

(2) Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

(3) Any person requested to identify himself or herself to a law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

| | |
|---|---|
| **STATE OF WASHINGTON,**<br>**Respondent,**<br><br>**vs.**<br><br>**PAUL JASON BURKS,**<br>**Appellant.** | **NO. 46512-4-II**<br><br>**AFFIRMATION OF SERVICE** |

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Russell D. Hauge
   Kitsap County Prosecuting Attorney
   614 Division Street
   Port Orchard, WA 98366
   kcpa@co.kitsap.wa.us

2. Paul Jason Burks
   c/o Mr. Tomas E. Weaver
   Attorney at Law
   P.O. Box 1056
   Bremerton, WA 98337

Dated this 12th day of January, 2015, at Longview, WA.

Donna Baker

# HAYS LAW OFFICE

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